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No. 99-1389

Supreme Court, U.S.
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In The

Supreme Court of the United States

SALT RIVER VALLEY WATER USERS' ASSOCIATION and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioners,

v.

THE UNITED STATES, THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, THE YAVAPAI-APACHE NATION, THE HOPI TRIBE, THE NAVAJO NATION, THE SAN JUAN SOUTHERN PAIUTE TRIBE, THE GILA RIVER INDIAN COMMUNITY, and SILAS KISTO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATUTORY PROVISIONS INVOLVED IN THE CASE

1. Arizona Revised Statutes (A.R.S.) § 45-401 provides, in pertinent part:

> A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.
>
> B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use groundwater in this state.

2. A.R.S. § 45-411 provides, in pertinent part:

> A. Four initial active management areas are established on the effective date of this section. The four initial active management areas are:
>
> 1. The Tucson active management area . . .

2. The Phoenix active management area . . .

3. The Prescott active management area . . .

4. The Pinal active management area . . .

3. A.R.S. § 45-451 provides, in pertinent part:

A. In an active management area, a person may:

1. Withdraw and use groundwater only in accordance with the provisions of articles 5 through 12 of this chapter.

STATEMENT OF THE CASE

I. HISTORY OF ARIZONA GROUNDWATER LAW

In *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), the Arizona Supreme Court addressed the issue of underground water. The Arizona Court drew a distinction between subflow, which it held to be appropriable under Arizona's prior appropriation laws, and percolating water, which it held not to be appropriable. The Court did not, however, provide a definition of or distinction between subflow and percolating waters.

The Arizona Court considered and rejected one set of definitions of subflow and percolating water in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) (*"Gila River II"*). In that decision, the Arizona Court acknowledged that this bifurcated system of water

rights – surface vs. groundwater – was not hydrologically sound.

> As scientific knowledge progressed, most states revised their water laws to provide for unitary management of hydraulically connected underground and surface water. Arizona, however, did not, and continues to adhere to a bifurcated system of water rights, with compelling implications for general stream adjudications.

175 Ariz. at 386, 857 P.2d at 1240.

The Arizona Court went on to note: "[W]e recognize that the line between surface and groundwater drawn by the Southwest Cotton court and reaffirmed by this court today is, to some extent, artificial and fluid." 175 Ariz. at 392, 857 P.2d at 1246.

The terms *subflow* and *percolating water,* for purposes of Arizona's bifurcated system, were again defined by the trial court and have again been taken to the Arizona Supreme Court on interlocutory review. The Arizona Court has received briefs and, in December of 1999, heard oral arguments. The parties await that decision.

In 1948, the Arizona Legislature adopted the Groundwater Act, which authorized the creation of critical groundwater areas. In 1952, in *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185 ("*Bristor I*"), the Arizona Supreme Court reversed *Southwest Cotton* and determined that percolating groundwater was appropriable. Upon rehearing, following a change in the composition of the court, the Arizona Supreme Court reversed *Bristor I* and readopted

the *Southwest Cotton* rule on non-appropriation of percolating groundwater. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953) ("*Bristor II*").

In 1980, the Arizona Legislature enacted the Groundwater Management Act and repealed the 1948 Groundwater Act. The Groundwater Management Act created active management areas ("AMAs") and irrigation non-expansion areas. The 1980 Groundwater Management Act was ruled constitutional in *Town of Chino Valley v. City of Phoenix*, 131 Ariz. 78, 638 P.2d 1324 (1981) ("*Chino Valley II*"). Therein, the Arizona Supreme Court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." 131 Ariz. at 82, 638 P.2d at 1328.

In *Cherry v. Steiner*, 543 F. Supp. 1270, 1280 (1982), the United States District Court examined the extent of the Groundwater Management Act's coverage.

> It established four AMA's, which account for 69 percent of the State's groundwater overdraft and 80 percent of the State's population. The three AMA's with safe yield goals account for 45 percent of the overdraft and 77 percent of the population in Arizona. The Arizona Department of Economic Security has forecasted that the State's population will explode most profoundly in the area encompassed by the Phoenix, Tucson and Prescott AMA's.

In *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 743-744 (1999) ("*Gila River III*"), the Arizona Court further

explained its understanding of the scientific, real-world errors in Arizona's water law:

> Yet the notion of subflow is an artifice, as we acknowledged in Gila River II, that rests on a hydrological misconception. [Citation omitted.] To pump well water from "lands under or immediately adjacent to a stream" is not, we now know, the only pumping that may significantly diminish surface flow. The hydrological connection of groundwater and surface water is sometimes such that groundwater pumped more distantly within an aquifer may have comparable effect.
>
> * * *
>
> Conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies.
>
> * * *
>
> A subflow standard, once it has been established, will serve to identify well-users who pump water subject to prior appropriation. But this adjudication is not limited to water subject to prior appropriation; it extends also to water subject to claims based on federal law. An adjudication such as this cannot achieve its comprehensive purposes without quantifying and prioritizing federal, as well as state law, claims.

II. HISTORY OF THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

In 1919, the Arizona Legislature adopted a procedure for the determination of conflicting water rights, which was amended in 1928 and 1939. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979). That procedure was conducted before the Arizona State Land Department in an administrative hearing, was limited to prior appropriation water rights, involved the rights of streams or water supplies but not entire river systems and sources, and did not address federal reserved rights.

General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow, 27 Ariz. Law Rev. 709 n. 2, 1985, sets forth the early history of Arizona's general water adjudications:

> On April 26, 1974, the Salt River Valley Water Users' Association (SRVWUA), invoking Arizona's statutory stream adjudication procedure, filed a petition with the Arizona State Land Department to determine conflicting rights to the use of water in the Salt River above Granite Reef Dam, east of Phoenix and excluding the Verde River. SRVWUA filed a similar petition for the Verde River and its tributaries on February 28, 1976. On February 17, 1978, Phelps Dodge Corporation filed two petitions with the State Land Department: one determining the conflicting rights to the Gila River, and the other determining the conflicting rights to the Little Colorado River.

The Arizona Supreme Court further described the history of these general water adjudications in *United States v.*

Superior Court of Arizona, 144 Ariz. 265, 270, 697 P.2d 658, 663 (1985):

> In 1979 the [Arizona State Land] Department advised various claimants of the pending petition and required that claims be filed pursuant to A.R.S. Section 45-232. Petitioners [San Carlos Apache Tribe, Tonto Apache Tribe, and the United States] were among the claimants so notified. Later that year several Indian tribes, including the petitioners, filed actions in the United States District Court for the District of Arizona, seeking a declaration of rights with respect to the issues raised in the proceeding before the Arizona State Land Department. Within two months after that filing, the state legislature repealed the former act (Sections 45-231 to 45-245) and replaced it with the present statute (article 6, Title 45, Arizona Revised Statutes, consisting of Sections 45-251 to 45-260 and entitled "General Adjudication of Water Rights").

A number of Arizona Indian Tribes brought actions in District Court, requesting relief from state administrative water adjudications. The parties to *In the Matter of the Determination of Conflicting Rights to the Use of Water From the Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), included the Salt River Valley Water Users' Association, the Phelps Dodge Corporation, the State of Arizona, the Gila River Indian Community, the San Carlos Apache Tribe, and numerous other Arizona Indian Tribes.

On January 18, 1980, the District Court remanded the actions to state court or dismissed them, without prejudice, based on the applicability of the McCarran Amendment. 43 United States Code (U.S.C.) § 666. The tribes had

contended that the State adjudication was not a McCarran Amendment proceeding because the Arizona water rights determination law deliberately excluded non-Indian uses of percolating groundwater. After an analysis of the *Winters* Doctrine, *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), and the applicable Arizona state law, the District Court concluded:

> Section 45-251(5), Arizona Revised Statutes, which effectively sets forth the scope of the State proceedings, defines the phrase "river system and source" as "(A)ll water appropriable under (A.R.S.) Section 45-101 and all water subject to claims based upon federal law."
>
> Thus, the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law. The only water rights excluded from the State proceeding are those rights to percolating groundwater arising solely under existing Arizona case law.

Granite Reef Dam, 484 F. Supp. at 784.

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source has now been in litigation for over twenty years. The current opinion, ("*Gila River III*"), reflects the sixth appearance of this general stream adjudication before the Arizona Supreme Court. In this action, the Arizona Court answered two interlocutory questions:

> Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law? (Interlocutory Issue 4)

> Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights? (Interlocutory Issue 5)

The Arizona Supreme Court answered both questions affirmatively. No Petition for a Writ of Certiorari was taken as to Interlocutory Issue 5.

ARGUMENT:

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI. CERTIORARI SHOULD BE DENIED.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion," and a petition for certiorari will be granted only for compelling reasons. Rule 10, Rules of the Supreme Court of the United States. There are no compelling reasons for the Court to grant this Petition.

I. THERE IS NO REAL OR INTOLERABLE CONFLICT BETWEEN THE LOWER COURTS.

This Court has stated:

> Certiorari is granted . . . only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and . . . where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479 (1951).

A. THERE IS NO CONFLICT BETWEEN THE FEDERAL COURTS AND THE ARIZONA SUPREME COURT.

The decision of the Arizona Court, as to Interlocutory Issue 4, is consistent with all federal court decisions that have made a determination as to the applicability of the *Winters* or federal reserved water rights doctrine to groundwater. The District Court for the District of Montana examined this issue, in 1968, in *Tweedy v. Texas Company,* 786 F. Supp. 383, 385, stating:

> The Winters case dealt only with the surface rights, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

The Ninth Circuit Court of Appeals also examined this issue in *United States v. Cappaert,* 508 F.2d 313, 317 (1974):

> The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water rights, the reservation of water doctrine is not so limited.
>
> Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation. Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); Tweedy v.

> Texas Co., 286 F. Supp. 383 (D. Mont. 1968). In our view the United States may reserve not only surface water, but also underground water.

The United States Claims Court stated, in *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699 (1986), that "[g]round water under the Gila River reservation impliedly was reserved for the Indians." The District Court for the District of Washington held that *Winters* or federally reserved water rights "extend to groundwater as well as surface water." *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (1978). *See also State of New Mexico v. Aamodt*, 618 F. Supp. 993 (D. N.M. 1985). In *Granite Reef Dam*, the Arizona District Court also held that the *Winters* or federal reserved water rights doctrine extended to groundwater. It then made an independent finding that determination of the rights of Indian and other federal reservations to percolating groundwater was required by the Arizona general water rights adjudication statutes.

Respondents found no federal case holding that the *Winters* doctrine does *not* extend to groundwater. Having cited no such case, it may be presumed that the Ninth Circuit Court of Appeals, the United States District Courts for the Districts of Montana, Washington, New Mexico and Arizona, the Arizona Supreme Court, and the Petitioners also found no such case.

Petitioners are incorrect in their claim that the Arizona Court has somehow created federal common law. The Arizona Supreme Court did not extend the *Winters* doctrine. Rather, the Arizona Court applied *Winters v. United States* in conformity with all of the existing federal court opinions that have examined the issue of reserved

rights to groundwater. The Arizona Court was correct in its determination as to Interlocutory Issue 4, under federal law as well as under the law of the State of Arizona.

B. THERE IS NO SIGNIFICANT CONFLICT BETWEEN STATE SUPREME COURTS.

The mere existence of a difference of opinion between two state supreme courts is not a sufficient reason for this Court to grant a petition for a writ of certiorari. There is no significant or compelling conflict between the opinions of the Arizona Supreme Court and the Wyoming Supreme Court. There is no "real and embarrassing conflict of opinion and authority" that requires this Court's time and review. As noted earlier, state laws governing surface and underground waters, and judicial recognition of the right to use those waters, vary widely from state to state. The State of Wyoming does not have the same water laws as the State of Arizona. The fact that two state supreme courts, examining an issue in light of their own state laws, might come to differing conclusions is hardly a basis for intervention by this Court. Other state courts can and will take both the Arizona Court's decision in *Gila River III*, and the Wyoming Court's decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76 (1988), for what they are – interesting opinions that may or may not be persuasive in light of the individual state's water laws. It would not be a proper utilization of this Court's resources to serve as a "super nanny" for the purpose of regulating state court interpretation of state water law.

Proof of the ability of the individual states to make an independent analysis, as to the issue of federal reserved water rights and groundwater and its application within a particular state system, is found in the Arizona Court's determination of Interlocutory Issue 4. After carefully considered the Wyoming Court's decision in *Big Horn,* the Arizona Court wrote:

> [T]he Supreme Court of Wyoming recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." [Citations omitted.] Yet the court declined to find a reserved right to groundwater, stating in explanation only that it had been cited no previous decision which did so. [Citation omitted.]
>
> We can appreciate the hesitation of the Big Horn court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Gila River III, 989 P.2d at 745.

Petitioners are incorrect in their claim that the decision of the Supreme Court of Montana, in *Confederated Salish and Kootenai Tribes v. Clinch,* 56 Mont. 1356, 992 P.2d 244 (1999), demonstrates some "uncertainty" over the issue of reserved rights in groundwater. Quite the opposite, that opinion demonstrates that other state supreme courts are able to read and consider both the decision of the Supreme Court of Wyoming and the Supreme Court of Arizona and, then, to make their own independent decisions based on the unique facts and laws of their

states. It is also important to note that the Montana District Court had already ruled, thirty years earlier, that the reserved rights doctrine applied to underground as well as surface waters. *See Tweedy v. Texas Company*, 786 F. Supp. 383.

Justice Stevens, in *McCray v. New York*, 461 U.S. 961, 961, 103 S. Ct. 2438, 2438-2439, 77 L. Ed. 2d 1322 (1983), writing concerning the denial of certain petitions for writs of certiorari, advised:

> I believe that the further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have [come to differing conclusions concerning prosecutors' use of pre-emptory challenges]. . . . [M]y judgment is it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by the Court.

Here, there appears to be no federal court decision that differs from the Arizona Supreme Court's determination on Interlocutory Issue 4. The only differing state supreme court decision indicated that it agreed with the logic that the Arizona Supreme Court used as the basis for its decision, but was unwilling to be the first to address the issue. Therefore, there is no real or significant conflict between the nation's courts that requires this Court's intervention.

II. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, WILL NOT CREATE SERIOUS PROBLEMS IN ARIZONA.

A. THE ARIZONA SUPREME COURT DECISION IS UNIQUE TO ARIZONA AND PRESENTS NO ISSUE OF NATIONAL IMPORTANCE.

Petitioners are partially incorrect in their claim that "the decision below would create grave, unique problems throughout Arizona." Petition, page 15. The decision on Interlocutory Issue 4 will have minimal impact on the majority of the lands and residents of the State of Arizona. However, Respondent agrees with Petitioners on one point – the effect of the Arizona Supreme Court's decision on Interlocutory Issue 4 is *unique* to Arizona and, therefore, presents no issue of national importance. No other state has Arizona's unique blend of water laws – including prior appropriation, a bifurcated underground water system, and administrative regulation of some, but not all, percolating waters – and Arizona's specific statute dealing with general adjudications of water rights.

The Arizona Supreme Court recognized the uniqueness of Arizona's groundwater laws in its decision on Interlocutory Issue 4, writing that "[c]onforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies." *Gila River III*, 989 P.2d at 744. Arizona's bifurcated system, which divides water into appropriable water (surface water and underground water designated as subflow) and non-appropriable water (underground water designated as percolating water), was recognized by the Arizona Court to be "an

artifice . . . that rests on a hydrological misconception." *Gila River III*, 989 P.2d at 743.

The Arizona Supreme Court's determination, as to Interlocutory Issue 4, was based on a detailed analysis of Arizona's unique general adjudication statutes and the interrelationship of those statutes to Arizona's unique groundwater law. The Arizona Court wrote:

> The City of Phoenix argues that our general adjudication statute permits us to adjudicate federal water claims only to the extent that they are claims to water that is appropriable under state law, and, thus, that we lack jurisdiction to consider federal reserved rights claims to non-appropriable groundwater. We summarily reject this argument because it is contrary to the plain, conjunctive definitional language of A.R.S. § 45-251(4) and because such an interpretation would deprive this adjudication of the comprehensive quality that our general adjudication statute was intended to provide.

Gila River III, 989 P.2d at 744 n. 5.

The Arizona Supreme Court, in this and other rulings with regard to the Gila River Adjudication, has studied the history of Arizona's statutes governing general adjudications of water rights. Prior to 1979, Arizona had a statute for determination of conflicting water rights that was administrative, was limited to state prior appropriation rights, and did not consider federal rights. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979).

In 1979, a number of Indian tribes filed actions arguing, *inter alia*, that Arizona's system for determination of

conflicting water rights did not comply with the McCarran Amendment because it did not provide for the adjudication of Indian rights to percolating groundwater. *See Granite Reef Dam*, 484 F. Supp. 778. Two months after the Indians brought these actions, the Arizona Legislature abolished its existing water rights determination process and adopted a totally new process that defined a general adjudication as a judicial determination of the rights of all persons (including Indian tribes) to use water in any river system and source. *See* A.R.S. § 45-251(1) and (3). The Arizona Legislature defined *river system and source* as "all water appropriable under § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251(7). Following the adoption of these statutes, the District Court either remanded the Indian cases back to state court or dismissed them, without prejudice, because "the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater)." *Granite Reef Dam*, 484 F. Supp. at 784.

The Arizona Supreme Court has correctly determined that the Arizona Legislature intended to include Indian water rights to percolating groundwater in its general water rights adjudication statutes.

> Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.

Johnson v. Frankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997).

The Arizona Court having interpreted the Arizona statutes as including federal rights to percolating groundwater, such "state interpetation is as though written into the ordinance itself." *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953). *See also Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978).

In *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967), this Court reviewed a specific California statute and stated:

> Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of s 26 and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discrimination to an unconstitutional degree. We accept this holding of the California Court.

Here, the Arizona Supreme Court, armed with knowledge of the facts and circumstances concerning Arizona's unique groundwater laws and unique general water rights adjudication statutes, recognized that Arizona's laws on percolating groundwater are hydrologically unsound. It further considered that the Arizona Legislature amended its statutes in response to certain federal court claims concerning percolating groundwater and that, based on the statutes' adoption, these federal court claims were remanded or dismissed.

The Arizona Supreme Court recognizes that "blind devotion to federal interpretation is not required; we

need not follow the federal cases if we believe Arizona policy, practice, or case law requires a different result." *Richie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990). Yet, based upon its intricate knowledge of Arizona's unique laws and unique hydrology, the Arizona Court determined that the Arizona statutes give Arizona courts the jurisdiction to adjudicate the rights of Indian and other federal reservations to percolating groundwater. Pursuant to its reasoning in *Reitman*, this Court should refuse to grant this Petition for a Writ of Certiorari.

Because of the complex factual and legal history surrounding the Arizona Court's determination as to Interlocutory Issue 4, this case does not present a good vehicle for this Court's review. First, neither the Petitioners nor any other landowners/water users have any "right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and the right of the owner of the overlying land is simply to the usufruct of the water." *Chino Valley II*, 131 Ariz. at 82, 638 P.2d at 1328. Thus, there is no need to consider any federal question because, under Arizona's local laws, Petitioners have no rights of ownership to the groundwater.

In addition, this case has been in litigation for over twenty years and the Arizona courts, state and federal, have decided this issue consistently over that twenty-year period. Based on the actions filed in *Granite Reef Dam*, the Arizona Legislature completely altered its process for water rights determinations. Based on the Arizona Legislature's actions, the District Court remanded the Indian claims back to state court because "the State proceedings will determine federal reserved rights

(including federal reserved rights to percolating groundwater)." *Granite Reef Dam*, 484 F. Supp. at 784. The Salt River Valley Water Users' Association, Phelps Dodge Corporation, and the State of Arizona, as well as the Gila River Indian Community and the San Carlos Apache Tribe, were all parties to that litigation. Whether the justification is res judicata, collateral estoppel, judicial estoppel, law of the case, or simply a realization that this has been the state of the law on this issue in this proceeding for twenty years, there is no reason for this Court to accept jurisdiction now. Salt River Project (Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District) had the opportunity to appeal the District Court's determination in 1980 and chose not to exercise that option.

B. THE ARIZONA SUPREME COURT DECISION DOES NOT IMPACT ON THE VAST MAJORITY OF ARIZONA'S CITIZENS.

Petitioners are incorrect in their claim that the Arizona Court's determination, as to Interlocutory Issue 4, will create grave problems throughout Arizona. In actuality, Issue 4 will have a very narrow impact. The Arizona Court noted, "some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping underground water." *Gila River III*, 989 P.2d at 746. The Arizona Court also wrote: "A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." 989 P.2d at 748. Thus, the federal reservations that *might* have water rights, under Issue 4, are those reservations that do not have surface water

resources available to them and have not had surface resources in the past. The water basins subject to Interlocutory Issue 4 represent only 1% of Arizona's current population – less than 20,000 people – and only 2% of current water use. *See* Appendices A-3 and A-4.

The Arizona Court's decision, with regard to Interlocutory Issue 5, indicates that holders of federal reserved water rights enjoy greater protection from groundwater pumping than do holders of state law rights. As in this Court's decision in *Cappaert v. United States*, 426 U.S. 128, 143, 96 S. Ct. 2062, 2071, 48 L. Ed. 2d 523 (1976), Issue 5 deals with the ability of a federal reservation to "protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Appendices A-2 through A-4 are based on the Arizona Department of Water Resources' *Arizona Water Resources Assessment* of August 1994, which divided the state into a number of water basins based upon similar hydrology. Interlocutory Issue 5 will affect those water basins that contain a federal reservation that has, or would have but for upstream development and depletion, surface water resources available. Issue 5 will also affect water basins without a federal reservation but that are hydrologically connected to basins with a federal reservation. Issue 5 does have the potential to impact on lands that encompass 87% of the current water use and 97% of the current population of Arizona. Interlocutory Issue 5, however, was not appealed.

In addition, the State of Arizona has created four groundwater active management areas that encompass the lands inhabited by the vast majority of Arizona's residents. At least 80% of the population of Arizona

resides in active management areas and over 67% of the water use of the state takes place in the active management areas. *Cherry v. Steiner,* 543 F. Supp. at 1280.

Use of percolating underground water is strictly limited in active management areas. Water users in the four active management areas had severe restrictions imposed upon their use of percolating underground water twenty years before the Arizona Supreme Court issued its opinion on Interlocutory Issue 4. The state parties, including SRP, have argued to the Arizona Supreme Court that the Arizona Groundwater Management Act, and its active management areas, may adequately protect federal reserved rights holders against groundwater depletion through its restrictions on the reasonable use doctrine and its requirement of conservation measures in parts of Arizona. The Arizona Supreme Court has decided that this is an open question, to be determined based upon the particular facts of a particular federal reservation. In light of the fact that the Arizona Groundwater Management Act may sufficiently protect the groundwater resources of the federal reservations, without resort to implementation of the Arizona Court's decision on Interlocutory Issue 4, it is proper for this Court to deny certiorari until there is a real, rather than hypothetical, question before it.

Much of Petitioners' Brief deals with insinuations that the Arizona Court's decision, as to Interlocutory Issue 4, might have a negative impact on some federal reservation – presenting vague, unsubstantiated hypotheticals, including the Hopi and Navajo Reservations. However, the Indian Tribes of Arizona, including the Hopi Tribe and the Navajo Nation, vigorously argued in

favor of the decision rendered by the Arizona Supreme Court – recognizing the legal and practical suitability of the Arizona Court's decision. The United States and the Indians understand the meaning, effect, and impact of the Arizona Court's decision as to Interlocutory Issue 4, and believe it is appropriate for federal reservations within Arizona.

Petitioners' claim, that this very limited decision would force Arizona to abandon existing state law governing groundwater and substitute a priority scheme, is in error. Arizona has a serious problem with depletion of its water supplies. As explained by the Arizona Supreme Court in *United States v. Superior Court of Arizona*, 144 Ariz. at 270, 697 P.2d at 662:

> We take note that the current state of our water supply is critical. Water usage in Arizona exceeds surface supply by three-fold in average years and by more in dry years, with the shortfall made up by pumping groundwater. We also take notice of the depletion of the available groundwater supply.

In 1931, Arizona adopted a groundwater system that divides underground water into subflow and percolating water. In *Gila River III*, 989 P.2d at 742, the Arizona Supreme Court recognized that percolating water was hydrologically connected to surface water. Despite the Arizona Supreme Court's recognition that Arizona's bifurcated system for underground water is not hydrologically sound, and is out of date with other states' application of modern and scientifically valid principles of hydrology, the Arizona Court has chosen to retain that bifurcated system.

The State of Arizona has taken some limited steps to deal with the scientific irrationality of its own laws. The first step was the Arizona Legislature's adoption of the Arizona Groundwater Management Act, which places restrictions on the use of percolating underground water in four critical management areas. The second step was the decision of the Arizona Supreme Court that it could not impose Arizona's hydrologically unsound groundwater system on federal reservations.

The Arizona Court did not abandon existing state law governing groundwater. Rather, it exercised its option to amend state law to deal with specific situations, while still retaining the general groundwater bifurcation. The Court's recognition that, under certain conditions, federal reservations might have a right to protect their groundwater resources from groundwater depletion does not abandon state law. The state rule on percolating groundwater remains in effect, modified by the Groundwater Management Act and by the Arizona Supreme Court's decision on Interlocutory Issue 4.

III. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, COMPLIES WITH THE GUIDELINES OF *UNITED STATES v. KIMBELL FOODS.*

While Respondent does not believe that a *Kimbell Foods* analysis was necessary, the Arizona Supreme Court did apply the test of *United States v. Kimbell Foods,* 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), in analyzing the applicability of federal law to the rights of

federal reservations to groundwater. The Arizona Court first discussed the need for application of federal law:

> [I]n order to adjudicate water rights based upon federal law, the Arizona courts must afford federal claimants the benefit, when state and federal law conflict, of federal substantive law. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).
>
> * * *
>
> [T]he Supreme Court has defined the reserved rights doctrine as an exception to Congress's deference to state water law. See United States v. New Mexico, 438 U.S. 696, 714, 98 S. Ct. 3012, 75 L. Ed. 2d 1052 (1978) . . . see also United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703, 19 S.Ct. 770, 43 L.Ed. 1136 (1899) (state law cannot be applied to destroy the federal government's right to water on its lands).

Gila River III, 989 P.2d at 744-745 and 747.

The Arizona Court then considered whether the application of state law, with regard to percolating groundwater, would frustrate specific objectives of federal programs. It noted:

> Where federal rights are at issue, a state court may adopt state law as the rule of decision if to do so would not frustrate or impair a federal purpose. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). *Such is not the case here.* [Emphasis added.]

Gila River III, 989 P.2d at 747.

After extensive analysis of how groundwater pumping could interfere with the present and future water rights of Indian and other federal reservations, the Arizona Court determined:

> We therefore cannot conclude that deference to Arizona's law – and to the opportunity it extends all landowners to pump as much groundwater as they can reasonably use – would adequately serve to protect federal rights.

Gila River III, 989 P.2d at 748.

Kimbell Foods discussed the need to consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 729, 99 S. Ct. at 1459. The Arizona Court considered this issue in detail:

> We recognize that our determination that reserved water rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses. State law parties may question how our present holding may be squared with our decision in Gila River II to retain Arizona's traditional bifurcation of the law of surface and groundwater. We are no less cognizant now than when we decided Gila River II that Arizona's agricultural, industrial, mining and urban interests have accommodated themselves to the framework of Southwest Cotton. [Citation omitted.] Yet there long has loomed the need – sometimes noted, sometimes wished away – for those same interests also to accommodate themselves to the water claims of the vast federal land holdings that surround them. [Citation omitted.] For state law purposes in

> Gila River II, we found reason to retain a bifurcated framework despite the hydrological misconceptions upon which it rested. But federal law does not permit us that option in deciding the extent of federal reserved rights. As Leshy and Belanger wrote in summary of Cappaert, "For federal law, the question is one of hydrology, not legal compartmentalization." 20 Ariz. St. L.J. at 734.
>
> We do not underestimate the burden that the State of Arizona will face in accommodating federal reserved water rights within its water resource management. Nor do we underestimate the burden that the trial court will face in adjudicating the extent and relative priority of such rights. Unless there is a comprehensive settlement, however, we must heed the lesson that "the best way out is always through." To solve the conflict and uncertainty that reserved rights engender, we must quantify them, for we may not ignore them.

Gila River III, 989 P.2d at 750.

The Arizona Court considered every element listed in *Kimbell Foods* and determined that the Arizona water rights adjudication statutes and Arizona water law made percolating groundwater available, when necessary, to fulfill federally reserved water rights.

IV. THE ISSUES BEFORE THE ARIZONA SUPREME COURT, CONCERNING INTERLOCUTORY ISSUE 4, ARE TOO PRELIMINARY TO WARRANT REVIEW BY THIS COURT.

While a state or federal court decision may be sufficiently final to meet the jurisdictional requirements for a writ of certiorari, the decision may be too uncertain or preliminary to warrant this Court's granting such petition. That is the situation in this case. It is important, of course, to point out that the Arizona Court's determination as to Issue 4 is interlocutory. It is more important to note the factors in the decision itself which evidence the Arizona Supreme Court's recognition that neither it, nor the trial court, is finished with this issue – and that further proceedings will be necessary to determine whether Interlocutory Issue 4 will ever have a real effect on any Indian or other federal reservation, or on any non-federal water user.

The Arizona Court wrote:

> For the foregoing reasons, we hold that the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater. We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters

> necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Gila River III, 989 P.2d at 739.

In a footnote, the Arizona Court reiterated that "[u]ntil federal rights are quantified, it cannot be determined which if any of the tribes are entitled to such relief." 989 P.2d at 749 n. 12. The Arizona Court also noted that its decision on the definition of subflow (Interlocutory Issue 2, briefed and argued but not yet decided) could conceivably be broad enough to protect the rights of some or all of the federal reservations. 989 P.2d at 749. The decision, as to Interlocutory Issue 2, will also affect whether Interlocutory Issue 4 will ever have a real-world effect.

At this time, no one knows if this issue is simply an interesting academic question that will never have an actual application. This Court should refuse to grant the Petition for Writ of Certiorari until it has been determined that the Arizona Court's ruling actually affects some specific federal reservation and some actual non-federal water user.

The Arizona Supreme Court also recognized that questions regarding the effectiveness of the Arizona Groundwater Management Code must be answered before a determination can be made as to whether Interlocutory Issue 4 would have any impact in the case of a specific reservation. The Arizona Court wrote:

> We similarly approach [rejecting as premature] the state law parties' argument that federal reserved rights holders may be adequately protected against groundwater depletion by the

> 1980 Groundwater Management Code, which restricts application of the reasonable use doctrine and mandates conservation measures in some parts of Arizona. . . . Whether any particular reservation receives adequate protection of its reserved water rights through the combination of Arizona's common and statutory law remains to be determined.

Gila River III, 989 P.2d at 749 n. 13.

Until the specific facts concerning individual reservations have been analyzed in light of the provisions of the Arizona Groundwater Management Code, the Arizona Court's ruling on Interlocutory Issue 4 remains merely a matter of academic and speculative interest.

V. CONCLUSION

There are no compelling reasons that would justify granting the Petition for a Writ of Certiorari filed herein. Therefore, the Gila River Indian Community respectfully requests that the Court deny this Petition.

Respectfully submitted,

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EXPLANATORY DATA

The Arizona Department of Water Resources ("ADWR") divided the state into a number of water basins in its *Arizona Water Resources Assessment of August 1994*. The ADWR water basins are based on interrelated hydrology – surface and underground water – within distinct land areas. The size and shape of a water basin is determined by the geology of the region.

The Arizona Department of Water Resources *Assessment*, Volume I, *Inventory and Analysis*, August 1994, pages 13, 14, 139, 141, 153, 155, 173, 175, 192, and 194, provided the data for the water basin map, the water basin designation, the population data per water basin, and the water supply data per water basin. Population figures of less than 100 people were rounded up to 100. Water use figures of less than 1000 acre-feet were rounded up to 1000 acre-feet.

A determination was made as to whether a particular ADWR water basin contained federal reserved lands (federal lands that have been designated as a federal reservation, such as an Indian Reservations, Military Reservations, National Parks, National Monuments, etc.). Bureau of Land Management lands that have not been designated as federal reservations, with potential *Winters*/reserved water rights, were not considered.

The ADWR water basins that are shaded purple contain federal reservations that have surface water resources available to them, or would have had surface water resources available but for upstream and/or neighboring development and depletion. If an ADWR water basin has or had surface water resources, and is upstream

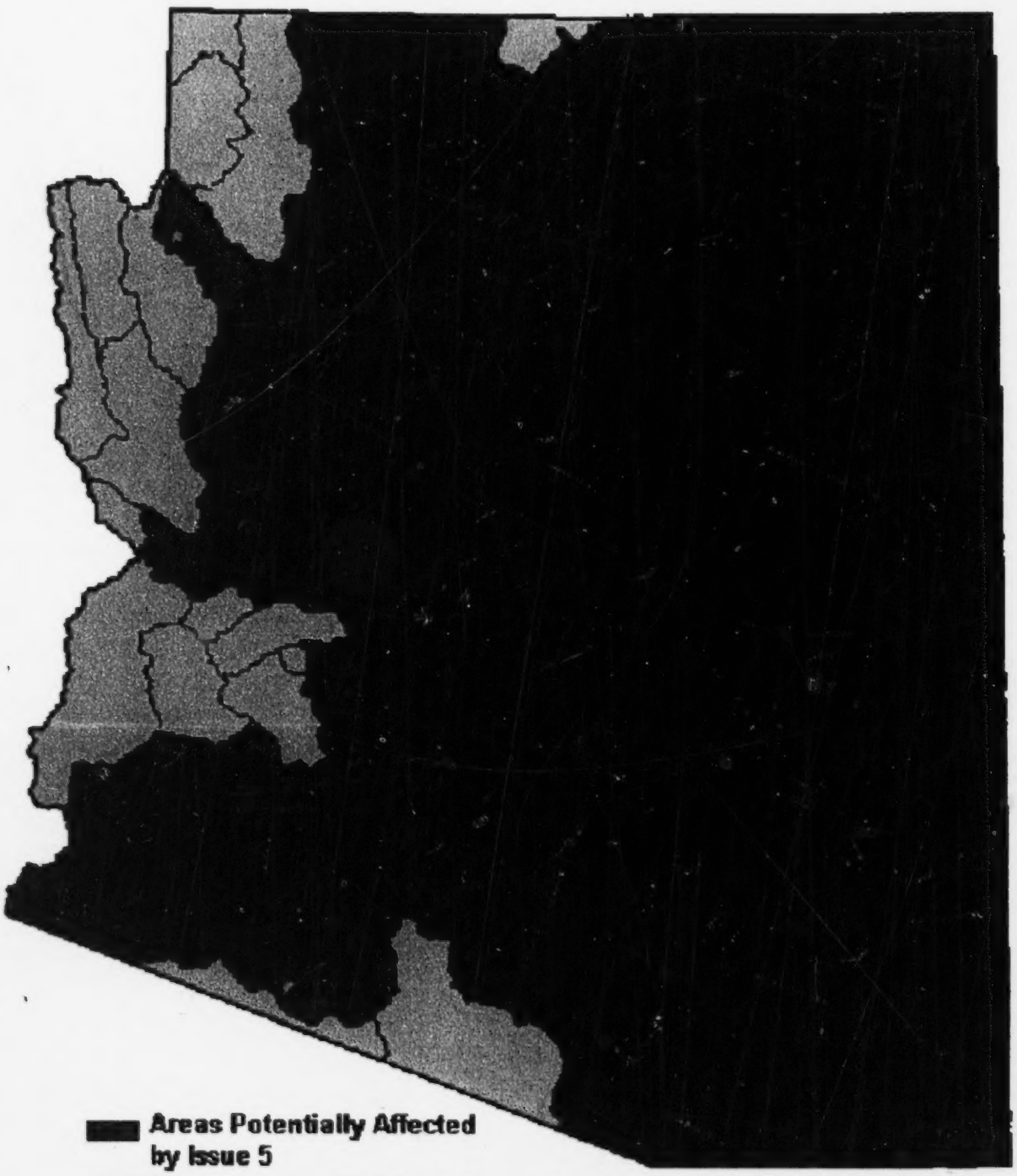
from a federal reservation that has or had surface water resources available to it, then this water basin is also shaded purple. An exception was made for any ADWR water basin that was 100% federal land, and was not upstream from another basin. [This water basin designation does not attempt to determine whether any of the federal reservations have any actual water rights. It only designates that the water basin does or did contribute to surface water that was or is available for use by the federal reservations, if such a water use right should be determined to exist.] ADWR water basins that contain federal reservations with actual or potential surface water resources provided from the Colorado River were not designated as purple because their water rights are governed by *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). The ADWR water basins that are shaded purple are subject to the Arizona Supreme Court determination on Interlocutory Issue 5; *i.e.*, that federal reserved rights holders are entitled to greater protection from groundwater pumping than are water users who hold only state law rights.

The ADWR water basins that are shaded green contain federal reservations that do not have surface water resources available to them, and did not have such resources available in the past. For these federal reservations, underground water is the only water resource available. If an ADWR water basin consisted totally of a federal reservation, it was not shaded green. The ADWR water basins that are shaded green are subject only to the Arizona Supreme Court determination on Interlocutory Issue 4; *i.e.*, that federal reserved water rights extend to groundwater (underground water) that is not subject to

prior appropriation under Arizona law. The water basins that are shaded green have no water resources available that would be subject to the Arizona Supreme Court's determination on Interlocutory Issue 5.

The ADWR water basins that are shaded yellow do not have a federal reservation and are not upstream of a federal reservation or, if they do have a federal reservation, that federal reservation's water use rights are governed by *Arizona v. California,* or are totally federally-owned.

Potential Impact of Issues 4 and 5 On Arizona's Hydrologic Regions



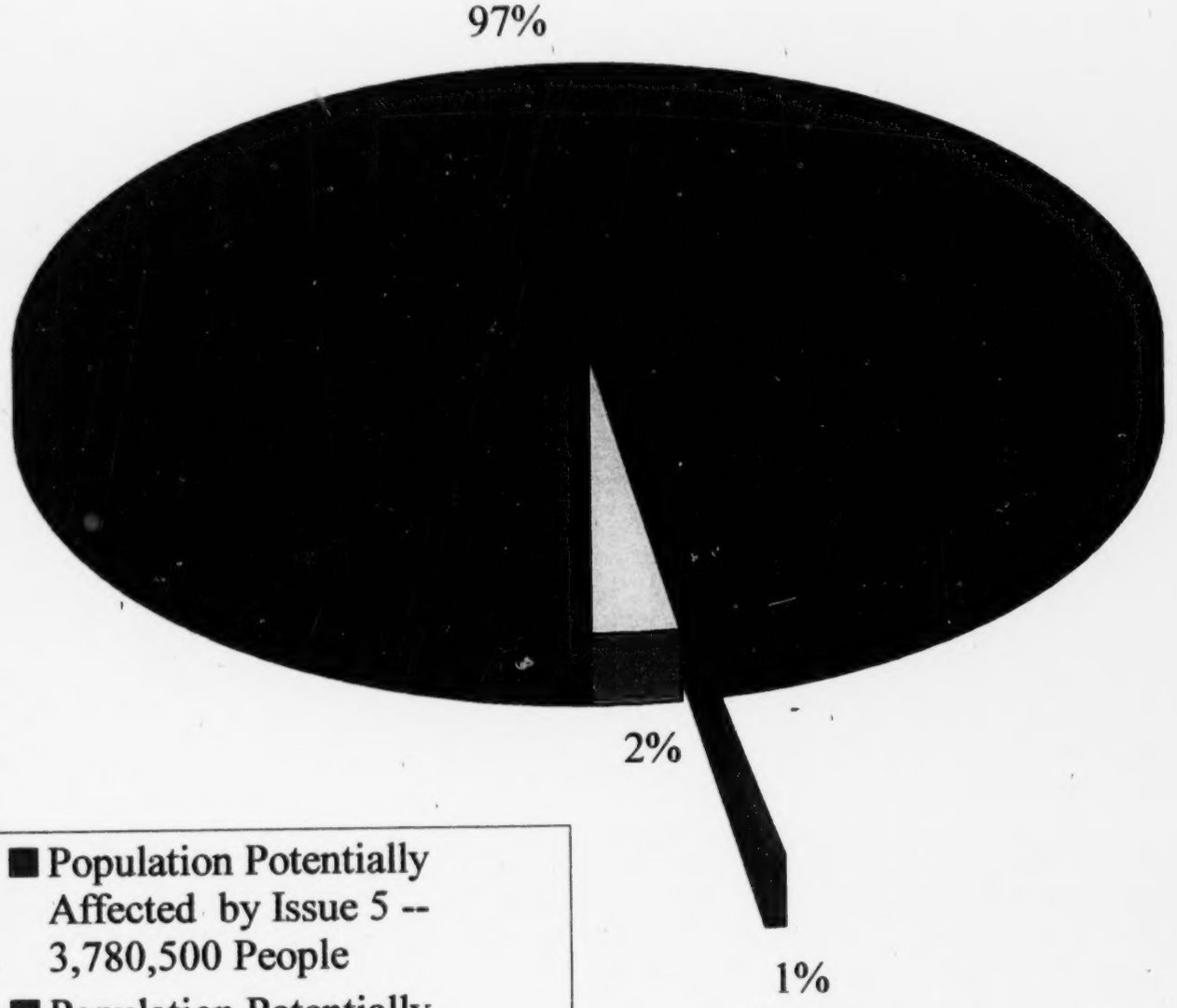
Areas Potentially Affected by Issue 5

Areas Potentially Affected by only Issue 4

Areas Unaffected by Issues 4 or 5

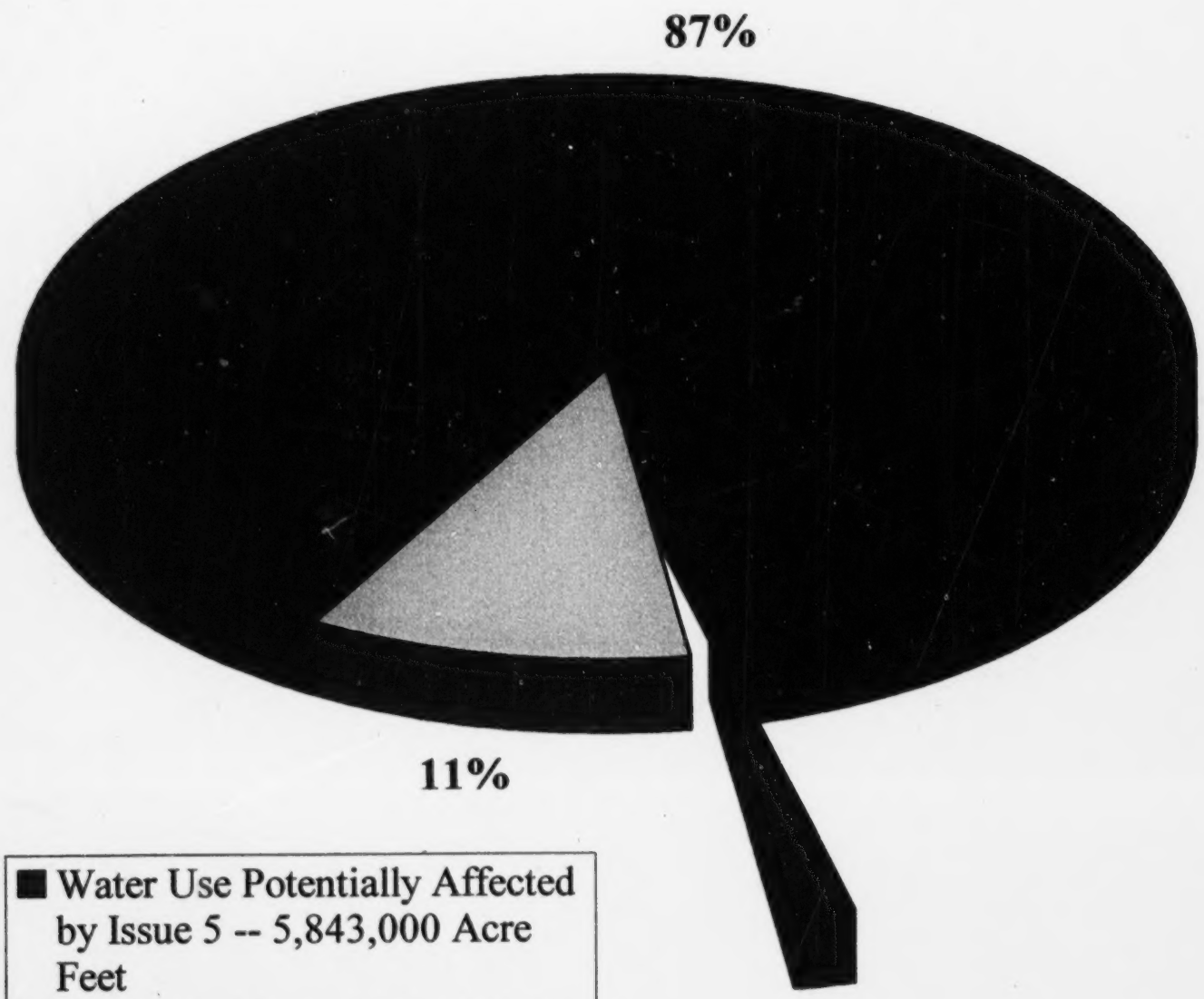
Map Base from ADWR Arizona Water Resources Assessment August 1994
Modifications and Determination of Regions by GRIC Office of Water Rights

Potential Impact of Issues 4 and 5 on Arizona's People



Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

Potential Impact of Issues 4 and 5 on Arizona's Water Use



Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994